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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

UNNAMED PHYSICIAN, Plaintiff and Respondent, v. HOAG MEMORIAL HOSPITAL PRESBYTERIAN, Defendant and Appellant.	G040918 (Super. Ct. No. 05CC11571) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Fulbright & Jaworski, Robert M. Dawson, Mark A. Kadzielski and Brandon C. Fernald, for Defendant and Appellant.

Law Offices of Theresa Barta and Theresa J. Barta for Plaintiff and Respondent.

Hoag Memorial Hospital Presbyterian, its medical executive committee (MEC), and its board of directors (collectively Hoag), all of whom were involved in a review of the petitioner physician's[1] professional competency, appeal from the trial court's issuance of a writ of mandate setting aside Hoag's letter of censure and imposition of probation in connection with the physician's medical staff privileges. Hoag argues the court lacked jurisdiction to review the decision because no hearing was required at the hospital level, and because its decision to issue the writ was contrary to law. We are not persuaded.

The court clearly had jurisdiction to review the disciplinary decision, either as a matter of administrative mandate pursuant to Code of Civil Procedure section 1094.5 if a hearing was required at the hospital level, or as a matter of traditional mandate under Code of Civil Procedure section 1085 if it was not. We conclude, as did the trial court, that in light of specific terms of the probation imposed on the physician, the hospital's medical staff bylaws required that the hospital afford him a hearing before imposing the disciplinary action. Moreover, the hospital further violated the physician's right to fair procedure when the MEC abruptly, and without advance notice, altered its recommended discipline and imposed a formal censure on the physician without affording him any advance notice or opportunity to be heard. Consequently, we affirm the trial court's decision to issue the writ.

FACTS

The petitioner physician is a duly licensed and board certified neurosurgeon. He was granted a temporary appointment to Hoag's medical staff in January of 2001, and became an active staff member in March of 2001. In July of 2002,

[1] The trial court granted the physician's motion to proceed anonymously in this case, and be designated only as "Unnamed Physician." Hoag apparently does not object to this decision, and we will consequently abide by it as well.

he submitted his application for reappointment for two years in accordance with the medical staff bylaws.

Although the MEC had initially recommended the physician's reappointment, Hoag's director of performance improvement sent a letter to the chairman of Hoag's neurosurgery department, recommending a further review of some of the physician's cases. The letter suggested the physician's cases demonstrated a possible pattern or trend toward excessive surgery times and complications. In response to the letter, the MEC appointed an ad hoc committee to review the physician's surgical times and complications, and the physician's reappointment to the medical staff was approved for only six months, rather than the usual two years.

The ad hoc committee concluded its review on June 5, 2003, finding the physician had demonstrated "significant deficiencies" in "only three of eight cases" it had focused on. The committee noted the physician was "relatively inexperienced (has been out of training for two years)" and is "unsafely overconfident." Nonetheless, the committee made no recommendations that any formal action be taken against the physician's medical staff privileges. Instead, it recommended that while "there is risk in continuing to allow him to proceed independently," it would be sufficient to accept the physician's offer to continue doing all "elective cranial and spinal surgeries with neurosurgeons who are active staff members," and to request that he amplify his chart documentation. At the end of six months, the committee would reevaluate his performance.

However, on June 13, 2003, the MEC rejected the ad hoc committee's recommendation, apparently concerned there was insufficient assurance the physician would follow through with his offer to do all elective surgeries with other neurosurgeons; it decided instead to recommend a *requirement* that "for the next six months, [the physician] will do each of [his] surgical cases at Hoag with an assistant who has full clinical privileges in neurosurgery and who actively performs neurosurgery at Hoag."

The assistant surgeon would be "involved in the preoperative assessment of the patient, including indications for surgery, and the postoperative care of the patient, as well as assisting during the surgery." The assistant would then "provide a written assessment of [the physician's] performance in each case to the Chair of the Department." The MEC acknowledged that these recommendations, if implemented, would constitute a restriction on the physician's clinical privileges at Hoag, and thus notified the physician he was entitled to request an evidentiary hearing before a judicial review committee (JRC) in accordance with the medical staff bylaws to challenge them. The MEC also notified the physician that if the recommendations were adopted by the hospital's board of directors, that fact would be reported to both the Medical Board of California and the National Practitioner Data Bank.

The physician requested a hearing to challenge the MEC's decision and requested discovery, in accordance with procedures set forth in the medical staff bylaws. However, on October 1, 2003, while the parties were still wrangling over discovery issues relating to the hearing, the physician was offered a fellowship in complex spinal surgery and spinal deformity at Northwestern University, for which he had applied prior to February of 2003 – several months before either the ad hoc committee or the MEC had reached any conclusions about his work.

The physician notified Hoag he intended to accept the fellowship, which was scheduled to commence on January 1, 2004, three months hence, and continue until June 30, 2004. The physician further informed the hospital he was also contemplating participation in an additional three-month fellowship in "skull-based procedures," either at Northwestern, or at another hospital in Long Island, New York, following completion of the first fellowship.

As a direct result of learning about the physician's fellowship plans, the MEC decided to reconsider its disciplinary recommendations. As reflected in the minutes of its meeting on October 15, 2003, the MEC questioned whether (1) the

fellowships wouldn't be a "better method of achieving the MEC purpose of providing a structured learning experience for [the physician] than the mandatory use of an assistant on cases at Hoag?" and (2) whether "there [was] any reason to expend the hospital and physician resources required to enforce the MEC recommendations for the mandatory use of an assistant through the JRC hearing process if the fellowships are a better method for achieving the purpose of the MEC recommendation. . . .?"

The minutes then suggest, as alternative to the MEC's prior recommendation, that it (1) issue a letter of censure to the physician, and (2) place him on "indefinite probation," conditioned on several requirements, including a requirement that he complete a six-month fellowship in complex spinal surgery and spinal deformity by June 30, 2004, as well as a three-month fellowship in skull based surgery by December 31, 2004. Additionally, the physician would be advised of his "obligation" to request a voluntary leave of absence from the medical staff "before he leaves the area . . . to participate in his fellowships."

The minutes conclude by noting the effect of the proposed alternative plan of discipline is that it "eliminates [the] need to continue the JRC hearing process" and "[a]dopts corrective actions which do not entitle [the physician] to a JRC hearing under the Bylaws."

It also "[a]llows [the] MEC to determine whether and on what conditions [the physician] will be reinstated from his leave of absence," and "[l]eaves [the] MEC free to adopt any other future corrective action recommendations it might deem appropriate in the event [the physician] violates any of the conditions of probation."

Having apparently concluded that this alternative scenario was more attractive than its original plan, the MEC adopted the alternative recommendations at its October 15, 2003 meeting. According to the hospital, the "indefinite probation" period actually went into effect that same day. However, it was not until nearly two weeks later,

on October 27, 2003, that the hospital sent the physician a letter informing him of its revised disciplinary decision.

The October 27, 2003 letter, stated the MEC had reconsidered its prior recommendations, and had decided instead to institute corrective action which included (1) issuance of a "letter of censure for the patient care deficiencies described in the case concerns and the conclusions of the Ad Hoc Committee report to the MEC . . . dated June 5, 2003"; and (2) placing the physician on "indefinite probation." The terms of that indefinite probation required the physician to – among other things – "[c]omplete a six-month fellowship in complex spinal surgery and spinal deformity by June 30, 2004, and a three-month fellowship in skull based surgery by December 31, 2004, at a recognized teaching hospital."

The letter then informed the physician that "[s]ince these revised corrective action recommendations do not restrict the exercise of your clinical privileges at Hoag, they do not constitute grounds for a hearing pursuant to Section 7.2 of the Medical Staff Bylaws . . . ." However, the letter then went on confirm that the physician's "planned fellowships *will cause you to leave the Hoag service area and cease practicing at Hoag for more than six months*," and inform him of his consequent "obligations under Section 3.7 of the Bylaws to request a voluntary leave of absence" from the medical staff during that period.

In other words, the conditions of the physician's "indefinite probation," which had already gone into effect by the time he learned of it, *required* that he commence nine months' worth of fellowships almost immediately, and, as a consequence, effectively *required* that he complete the Northwestern fellowship which had been recently offered to him, thus obligating him to leave the geographic area and take leave of absence from the Hoag medical staff.

Moreover, the formal letter of censure, which had never previously been suggested, let alone recommended, during the disciplinary process by either the ad hoc

committee or the MEC, was then immediately issued on October 27, 2003, the very same day the MEC notified the physician of its changed decision. The censure letter is addressed to the physician, and nowhere reflects that it is either intended to remain confidential or is protected from routine disclosure.

On December 3, 2003, the physician was reappointed to active membership on Hoag's medical staff for an additional six-month period. The physician was placed on a leave of absence from the medical staff, effective January 1, 2004.

The physician filed his initial civil complaint in this action, seeking both injunctive relief and damages, in October of 2005. The complaint alleged the Hoag defendants' actions were in violation of the medical staff bylaws, and damaged his reputation, economic interests and career. He also alleged that certain unnamed Hoag physicians had made false and defamatory statements regarding him and his reasons for accepting his fellowship. He asserted that one or more of the Hoag defendants disclosed private and confidential information relating to the peer review process.

The complaint included causes of action for injunctive relief, violation of due process, violation of hospital bylaws, intentional and negligent interference with prospective economic advantage, intentional infliction of emotional distress, defamation, violation of rights to privacy and confidentiality, unfair competition, and racial discrimination in violation of the Unruh Act.[2] He sought relief in the form of an order requiring the Hoag defendants to (1) rescind their "censure" and imposition of probation against him; and (2) expunge the letter of censure and any other evidence of the censure from his credentials file. He also asked for damages, including punitive damages.

Rather than filing an answer to the physician's complaint, the Hoag defendants filed, concurrently, both a demurrer and a motion to strike the complaint as a

[2] The physician is of Latino ancestry and origin.

SLAPP action. The court concluded the anti-SLAPP law was inapplicable to this case, and denied that motion.

Hoag appealed that denial, and we reversed, remanding the case to the trial court to consider whether the physician had demonstrated a probability of prevailing on any of his claims.[3] The court thereafter concluded that portions of the complaint which the physician had styled "causes of action" for injunctive relief, violation of due process and fair procedure, and violation of hospital bylaws, could be pursued by way of writ of mandate and would be construed as such. However, the court determined there were insufficient grounds to maintain such a writ proceeding against the individual defendants, and so those claims were dismissed with prejudice as against those individuals. The remaining causes of action were dismissed without prejudice.

Hoag then demurred to the petition. Hoag argued both that the pleading as a whole failed to state a claim for a writ of mandate, because the minimal discipline imposed upon the physician in this case did not rise to the level which entitled him to any right to "fair procedure" under common law, and that each of the three "causes of action" alleged therein failed to state a claim upon which relief could be granted.

Specifically, with respect to the claim for "Violation of Hospital Bylaws," Hoag asserted there was no such recognized "cause of action," and that in any event, since the medical staff bylaws in this case authorized it to impose either a censure or probation on a physician without according him any hearing, the facts alleged demonstrated no violation of those bylaws.

The physician opposed the demurrer on the merits, while also pointing out that Hoag's focus on the specific "causes of action" alleged was inappropriate, since those "causes of action" had been alleged as part of what had originally been pleaded as a civil complaint for damages and injunctive relief, then later deemed a petition for writ of

[3] In light of the anonymity order, we will not cite to our prior opinion, which reflects the name of the physician.

mandate. In the context of such a petition, it was appropriate to view the factual allegations as a whole, in determining whether they constituted a sufficient basis to support the physician's ultimate assertion; i.e., that Hoag had failed to afford him the fair process required by common law in the course of this particular disciplinary proceeding.

The physician asserted that unfairness might be demonstrated in a variety of ways – not only by proving a violation of Hoag's own medical staff bylaws, but also, in the absence of such a violation, by a showing that the bylaws had been applied in an unfair or biased manner, or were demonstrated to have provided an insufficient process in the context of this case. Thus, the physician argued that his petition stated a claim for issuance of a writ of mandate without regard to whether it stated any distinct claim based solely upon a violation of the bylaws. He explained that "the point of the third cause of action is . . . evidentiary support, the violation of the bylaws show the unfairness of how Hoag proceeded through its actions."

After considering the parties' arguments, the court sustained the demurrer to the third "cause of action" for violation of hospital bylaws. In doing so, the court noted that the physician had "implie[d] in opposition that he agrees he did not have a right to a hearing under the by-laws in this situation – action was not reportable." The court did give the physician leave to amend that third cause of action, but the physician declined.

The parties thereafter submitted the administrative record to the court, and the petition came on for hearing in January of 2008. The physician clarified that he was challenging only the procedural fairness of the hospital's disciplinary proceeding, rather than the soundness of any judgments made about his surgical proficiency during the course of those proceedings – although he stated for the record his belief that the

evidence had been insufficient to support any findings adverse to him – and thus the court was not being asked to review those judgments.[4]

After hearing argument from both sides, the court took the matter under submission. The court then issued its decision granting the writ. The court explained it had concluded the physician's right to fair procedure had been violated because "[t]he actions against [the physician] were potentially adverse and constituted grounds for a hearing. [The hospital] failed to provide notice and hearing of the MEC's intent to censure Petitioner and/or place him on probation as required by [the hospital's] Bylaws Section 7.2(h). Fair procedure at common law, which includes an entity's own bylaws, generally requires notice and a hearing." The court ordered that the physician's probation and letter of censure be set aside, and remanded the case to the hospital "to conduct a properly noticed hearing."

I

The cases involving internal decisionmaking relating to hospital staff privileges are something of a hybrid. Although most decisions are made in accordance with internal "bylaws," those bylaws are themselves subject to specific statutory requirements. (Bus. & Prof. Code, § 805 et seq.) As explained in *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 617, "[t]he statutory scheme delegates to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights, all specified in the statute. (*Shacket v. Osteopathic Medical Board* (1996) 51 Cal.App.4th 223, 231; see §§ 809 to 809.8.) . . . To comply with the statute's mandate, the hospital's medical staff must adopt bylaws that include formal procedures for '"the evaluation of staff

[4] It appears the physician may have backed off from that clear position at some point, as the court's ruling on the mandate petition reflects that it had denied "[p]etitioner's request that this Court exercise its independent judgment and find that the evidence is insufficient to support [the hospital's] actions." In any event, since the court based its decision to issue the writ solely on considerations of procedural fairness, rather than on the sufficiency of the medical evidence, we will likewise confine our review to those procedural issues.

applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate." [Citation.]' (*Oliver v. Board of Trustees* [(1986)] 181 Cal.App.3d [824,] 827.) It is these bylaws that govern the parties' administrative rights. (*Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, 365.)"

Because the bylaws are required to comply with certain minimum statutory procedural requirements, a physician can challenge the outcome of a disciplinary proceeding by way of a petition for writ of mandate in the courts, if the manner in which it was conducted did not satisfy those requirements. (See, e.g., *Bode v. Los Angeles Metropolitan Medical Center* (2009) 174 Cal.App.4th 1224; *Sahlobei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137.) However, even in situations where the statutory requirements were complied with, a physician may still assert a claim that he or she was denied fair procedure, either because the bylaws themselves obligated the hospital to do more than required by the statutes,[5] or because the procedures utilized were simply insufficient to provide a fair process in light of the significant interests at stake. "'California courts have long recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations which control important economic interests.' (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 656.) Such a private organization's actions must be both substantively rational and procedurally fair. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550.) What constitutes a fair procedure is not fixed or judicially prescribed. '[T]he associations themselves should retain the initial and primary responsibility for devising a method which provides an applicant adequate notice of the

[5] As explained by our supreme court in *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1274, "[Business and Professions Code] section 809.6, subdivision (a) authorizes hospitals to develop their own procedures and provides that parties to peer review proceedings 'are bound by any additional notice and hearing provisions contained in any applicable professional society or medical staff bylaws which are not inconsistent with [the statutory peer review process].'"

"charges" against him and a reasonable opportunity to respond. In drafting such a procedure . . . the organization should consider the nature of the tendered issue and should fashion its procedure to insure a *fair* opportunity for an applicant to present his position. Although the association retains discretion in formalizing such procedures, the courts remain available to afford relief in the event of the abuse of such discretion.' (*Id.* at pp. 555-556.)" (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445.) Moreover, the right to fair procedure with respect to membership actions is not limited to situations where the physician is faced with exclusion or expulsion from practice. (See *Delta Dental Plan v. Banasky* (1994) 27 Cal.App.4th 1598, 1607, [right to participate on insurer's panel of approved dentists constituted an "important economic interests"]; *Salkin v. Cal. Dental Assn.* (1986) 176 Cal.App.3d 1118, 1125 [imposition of public censure].)

The determination of whether the physician received a fair hearing as a result of the undisputed events which comprised Hoag's disciplinary proceeding is a conclusion of law, rather than a finding of fact, and thus our review of that issue is de novo. (*Rosenblit v. Superior Court, supra,* 231 Cal.App.3d at pp. 1442-1443.)

With these principles in mind, we turn to Hoag's contentions.

II

Hoag first argues the court lacks jurisdiction to review its disciplinary decision, because Code of Civil Procedure section 1094.5 allows a writ of mandate to be issued only in connection with an "order or decision made as the result of a proceeding in which by law a hearing is required to be given," and Hoag contends that no such hearing was required here.

And second, even if no hearing had been required at the hospital level, the court could still review the hospital's decision by way of a petition for traditional mandate under Code of Civil Procedure section 1085. The rule is explained in some detail in *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843: "The

proper method of obtaining judicial review of most public agency decisions is by instituting a proceeding for a writ of mandate. (*Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 328-330.) Statutes provide for two types of review by mandate: ordinary mandate and administrative mandate. (Code Civ. Proc., §§ 1085, 1094.5.) The nature of the administrative action or decision to be reviewed determines the applicable type of mandate. (*Tielsch v. City of Anaheim* (1984) 160 Cal.App.3d 570, 574.) In general, quasi-legislative acts are reviewed by ordinary mandate and quasi-judicial acts are reviewed by administrative mandate. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567; *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230-231.) But judicial review via administrative mandate is available 'only if the decision[] resulted from a "proceeding in which by law: 1) a hearing is required to be given, 2) evidence is required to be taken, and 3) discretion in the determination of facts is vested in the agency. [Citations.]" [Citation.]' (*Weary v. Civil Service Com.* (1983) 140 Cal.App.3d 189, 195.) Thus, ordinary mandate is used to review adjudicatory actions or decisions when the agency was not required to hold an evidentiary hearing. (*Ibid*.)" (*Bunnett v. Regents of University of California*, *supra,*35 Cal.App.4th at p. 848, fn. and italics omitted.)

In light of these authorities, we have no trouble concluding the court was properly vested with jurisdiction to review the hospital's decision.

III

Hoag next contends the court erred in concluding the physician was entitled to a hearing in this case, because "California statutes do not provide for a hearing requirement in the circumstances of this case." However, the court did not base its conclusion on any statutory requirement that a hearing be provided; instead, the court cited Section 7.2(h) of Hoag's medical staff bylaws as support for its conclusions, noting that fair procedure required Hoag to comply with those bylaws.

The court's reasoning was correct. As we have already noted in footnote 4, *ante*, statutory provisions specifying the circumstances under which hearings are required in medical staff disciplinary cases are not exclusive, and do not preclude hospitals from developing additional procedures to govern their own medical staff disciplinary actions, as long as those provisions are not inconsistent with statutory requirements. And while Hoag asserts its bylaws simply "mirror" the statutory requirements for determining when a hearing is required, we cannot agree.

Business and Professions Code section 809.1 requires that hospitals afford a hearing to any licensed member of its medical staff before imposing discipline which is required by statute to be reported to the relevant licensing or regulatory agency. Such "reportable" discipline includes situations where: "(1) A licentiate's application for staff privileges or membership is denied or rejected for a medical disciplinary cause or reason. [¶] (2) A licentiate's membership, staff privileges, or employment is terminated or revoked for a medical disciplinary cause or reason. [¶] (3) Restrictions are imposed, or voluntarily accepted, on staff privileges, membership, or employment for a cumulative total of 30 days or more for any 12-month period, for a medical disciplinary cause or reason." (Bus. & Prof. Code, § 805, subd. (b).)

By contrast, Hoag's medical staff bylaws guarantee its members a right to hearing any time the recommended discipline falls into one of 11 categories. Those categories substantially overlap, but are not coextensive with, the "reportable" actions identified in the statute.[6] If Hoag's medical staff had wished to limit the bylaws' hearing

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[6] The recommended disciplinary actions which entitle a staff member to a hearing under Section 7.2 of Hoag's bylaws are:

"a) denial of Medical Staff membership.

"b) denial of requested advancement in staff membership status, or category, or a denial of a recommended extension of Provisional Staff status.

"c) denial of Medical Staff reappointment.

"d) demotion to lower Medical Staff category or membership status.

"e) suspension of staff membership.

"f) revocation of Medical Staff membership.

"g) denial of requested clinical privileges.

"h) involuntary reduction of clinical privileges.

provisions to those situations where hearings were *statutorily required*, then it could have simply stated such a rule. But it did not, preferring instead to delineate its own list of situations in which a hearing would be provided. Thus, we reject Hoag's assertion that no hearing could have been required under its bylaws, since none was required by statute.

Hoag also suggests the court was somehow obligated to reject the contention its refusal to afford the physician a hearing might have constituted a violation of its own bylaws, because the court had earlier sustained a demurrer to the physician's "cause of action" styled "Violation of Hospital Bylaws." We cannot agree.

First, as everybody seemed to agree at the time of the demurrer, alleging a distinct "cause of action" for violation of medical staff bylaws served no particular purpose in the context of a lawsuit which had morphed from an ordinary civil action into a petition for writ of mandate. Hoag had argued there was simply no such cause of action, and the physician had argued that any evidence Hoag's violation of the bylaws would simply be support for his core contention that he had been denied a fair procedure. Moreover, in its order sustaining the demurrer to that claim, the court seemed to suggest that its ruling was based upon the physician's implicit concession that the bylaws did not provide for a hearing because the "action was not reportable." But to the extent the physician may have agreed with the latter point – that the action was not "reportable" so as to trigger a *statutory* requirement for a hearing – he certainly never conceded anything with respect to compliance with the bylaws.

And to the extent the court may have believed, at the time of the demurrer, that statutory hearing requirements were coextensive with the hearing provisions contained in the bylaws, it appears the court had revised that belief by the time it issued

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"i) suspension of clinical privileges.
"j) termination of all clinical privileges.
"k) involuntary imposition of significant consultation requirements that unreasonably restrict the Member's exercising the clinical privileges that he/she has been granted in accordance with these Bylaws (excluding routine monitoring and monitoring incidental to Provisional Staff status and Section 4.3)."

its ultimate ruling. The court was free to do so, as it was not bound by its interim analysis of any issue. (*Montegani v. Johnson* (2008) 162 Cal.App.4th 1231, 1238, citing *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108.)

Ultimately, as the court made clear in its order issuing the writ of mandate, it adopted the physician's theory that any violation of Hoag's medical staff bylaws would constitute evidence supporting his contention he was denied fair procedure in the context of the underlying disciplinary proceedings. In our view, that analysis was correct. Moreover, we also agree with the court's specific determination that the discipline imposed against the physician in this case amounted to an "involuntary reduction of clinical privileges" as that term is used in Section 7.2 (h) of the bylaws, and thus qualified as the type of discipline which entitled him to a hearing before being imposed.

Of course, Hoag strongly disagrees, but its argument is premised entirely on its characterization of the discipline as consisting of merely a "probation" and "confidential censure" – neither of which is included by name on the list of proposed disciplines which entitle the physician to a hearing. However, in doing so, Hoag focuses unduly on the *label* it has given to its disciplinary decision, rather than on the *substance and effect* of that decision. We cannot ignore that substance and effect, since it is the practical impact of an administrative decision on the individual's livelihood which determines the significance of the interests at issue, and thus the level of procedural protections which are required to fairly adjudicate those interests. (*Applebaum v. Board of Directors, supra,* 104 Cal.App.3d at p. 657 ["[s]pecific requirements for procedural due process vary depending upon the situation under consideration and the interests involved."].)

In this case, Hoag would apparently like us to assume that all "probations" are equal, and, by definition, do not implicate a physician's ability to exercise his staff privileges. This case demonstrates the opposite is true. The probation imposed in this case was not of the variety that merely operates as a warning to someone that he or she is

being closely scrutinized for some period of time and should thus be on best behavior while continuing to adhere to normal work routines. The probation in this case actually *required* the physician to complete nine months worth of fellowships – at some other hospital – and to request a leave of absence from Hoag's medical staff while doing so. Those terms of probation cannot be ignored, and thus we reject Hoag's assertion that the probation "in no way limited [the physician's] staff privileges at Hoag."[7]

Moreover, Hoag clearly intended for that to be the case. As reflected in the minutes of its October 15, 2003 MEC meeting, the fact that the "probation" imposed would effectively obligate the physician to request a leave of absence from the staff, and that the MEC would then have the power "to determine whether and on what conditions [the physician] will be reinstated from his leave of absence," were considered key advantages of choosing that contemplated probation over the monitoring requirements previously recommended – as was the perceived ability to avoid the hearing which the physician was otherwise been entitled to.

Given that the *effect* of the "probation" imposed upon the physician was to require him to leave Hoag's medical staff for some substantial period of time, and return only after successfully completing nine months' worth of intensive fellowship training elsewhere, it seems clear the probationary order amounted to – and was intended to be – an "involuntary reduction of [the physician's] current clinical privileges." Such a substantial restriction on the physician's ability to continue practicing his profession at Hoag could not be imposed without affording the physician both advance notice and the opportunity to challenge the decision at a hearing. Neither was afforded to him here.

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[7] Similarly, we reject Hoag's characterization of the probation as a "lesser" disciplinary alternative to the monitoring requirements initially recommended by the MEC (and which Hoag has always conceded would trigger the physician's right to a hearing). Although it may have been perceived as a *cheaper* alternative for Hoag itself, the minutes of the meeting at which the MEC adopted the probation idea reflect that the MEC viewed the contemplated fellowships as providing a more intensive form of training for the physician than he would have obtained through simple monitoring of his surgeries at Hoag, and thus it amounted to a more stringent requirement imposed on him. Nowhere does the MEC imply that the probation imposes less of a burden on the physician himself.

The second aspect of the hospital's disciplinary decision, the so-called "confidential censure" fares no better. As we have already alluded to in our recitation of the facts above, nothing in either the letter itself, nor in the medical staff bylaw which authorizes it, requires that a letter of censure letter remain "confidential."[8] Moreover, according to the evidence introduced in connection with the mandate proceeding, disclosure of any such "censure" is routinely required on applications for insurance, for medical licensure in other states, and for membership on other medical staffs. Indeed, it's difficult to understand what the hospital hoped to achieve by issuing the censure letter, if not public disclosure, since it is clear that (1) the physician himself was already painfully aware of the concerns reflected therein; and (2) those concerns had also been extensively documented in the hospital's own file during the course of the disciplinary proceeding.

Thus, as a practical matter, there is nothing "confidential" about the censure, and no basis to distinguish this court's opinion in *Salkin v. California Dental Association, supra,* 176 Cal.App.3d 1118, which concluded that issuance of a "public" censure was the type of discipline which implicated a physician's right to fair procedure. And in this case, the censure was issued without any advance notice, and without giving the physician *any* opportunity to argue against it. Indeed, had he been given the opportunity to do so in advance, the physician might have legitimately questioned why, when his underlying conduct had not been considered sufficiently egregious to warrant a formal censure when the MEC initially recommended imposing the monitoring requirement for his continued surgeries at Hoag, it was suddenly perceived as justifying that censure when the plan was changed to requiring him to complete the fellowships. However, because the censure had already issued by the time the physician learned it was even being contemplated, he had no opportunity to persuade the MEC not to follow

[8] Section 6.2-4 of the medical staff bylaws authorizes the MEC to "issue letters of admonition, censure, reprimand or warning," but nowhere states that such letters will remain confidential.

through with it. We agree with the trial court's implicit determination that fair procedure required he be afforded at the least that minimal opportunity before being subject to a formal censure.

The order issuing the writ of mandate is affirmed. The physician is to recover his costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.